

A Legal Analysis of the Status of the Bihari Community Living in Bangladesh: Becoming Citizen from Statelessness

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Abstract

This research aims to examine the current status of the Bihari Community. History, national statutes and judicial interpretations are highly scrutinised in order to understand how this community became stateless and what is their current status. This study has found that after the groundbreaking judgement of Sadaqat Khan Case, all the people of the Bihari Community became the citizens of Bangladesh except the people who were above the age of eighteen years during the liberation war. Thereafter, it is suggested that all those people should be allowed to become the citizen of Bangladesh as their repatriation is not possible and declaring them as the citizen of Bangladesh would not be the violation of any current Act regarding the citizenship of Bangladesh.

1. Introduction

From the perspective of Bangladesh, the term Bihari basically means those people who arrived here from India during 1947 in order to protect themselves from communal prosecution. Those people have been living here for more than 60 years or so but their legal status is still not confirmed and thereby, they are facing a lot of difficulties in terms of getting civic benefits. Basically, the whole community is divided into two groups where one group wants to be a citizen of Bangladesh as they are born and bred in this country whereas the rest of the population is willing and still dreaming to be the citizens of Pakistan. The Supreme Court of Bangladesh has already provided a clear verdict that this ill fated population is the Jus Soli citizen of Bangladesh in 2008 [1]. But the government is not willing to consider them as the citizens of Bangladesh as the government did not take any initiatives to fulfil the directions of the Court [2]. Furthermore, the Bangladesh Government has tried to pass a legislature named, "The Citizenship Act" in order to prevent them from being the citizens of Bangladesh. To make the matter worse, the Government of Pakistan is not willing to receive them and Pakistan is trying to force the Government of Bangladesh to consider them as the citizens of Bangladesh. According to them, it is the responsibility of Bangladesh as the former East Pakistan to recognise them as the citizens of Bangladesh. Moreover, the Supreme Court of Pakistan has also stated that Bihari Community living in Bangladesh are not the responsibility of Pakistan [3].

Thereby, the door of repatriation of this community to Pakistan is near impossible. In this situation, it is very difficult to identify the legal status of the Bihari Community. According to the author their situation is much worse than the Rohingya Community as those people at least receive some benefits from the national and international organisations. Therefore, in this paper the author would try to address, what made those people stateless and what is the current legal status of this community by analysing the laws of citizenship and the recent finds of the Court in this regard.

2. History of the Bihari Community

As stated earlier this community gathered here in Bangladesh from different parts of India (Bihar, Orissa, Uttar Pradesh, Sikkim and so on) [4]. They came here in 1947, in order to save themselves from the communal violence that took place between Hindu and Muslim. At that time, the situation was so devastating that they had no other option than to leave their native place. To some experts, at that time more than 30,000 Bihari people were executed due to the violence which lasted for more than a week. In fact, Kaiday Azam Jinnah was shocked and stated, "I never dreamt that in my lifetime I shall see Pakistan in being, but the tragedy of Bihar has brought it about" [5]. Moreover, Jawaharlal Nehru issued a statement, saying "We must put an end to this madness; we can argue later," and he also added "What has happened and what is happening in certain parts of Bihar province is terrible and I can hardly believe

that human beings can behave in such a manner [6]." At the same time, Mahatma Gandhi went for a hunger strike until and unless such massacre was not being addressed. Muslim League took a lot of initiatives such as providing foods and necessities as a relief to those ill-fated people. In fact, the Father of the Nation, Bangabandhu Sheikh Mujibur Rahman went there in order to observe the situation and provide relief. It is stated by some of the historians that Bangabandhu has indeed invited them to the state in Bangladesh (the then East Pakistan) in order to avoid that massacre. Later on, it is estimated that more than 12-14 million Bihari were bound to take shelter in different parts of Pakistan.

Those people later on declared as the citizen of Pakistan by the Pakistan Citizenship Act [7]. where it has been stated that every person shall deem to be the citizen of Pakistan who either born in Pakistan or who were living within the territory of Pakistan from the fourteen day of August 1947 (Section 3(a) of Pakistan Citizenship Act, 1951). From then on they had no issue with their citizenship status. In fact, they were one of the privileged communities of East Pakistan due to their ability to speak Urdu and English fluently. They were appointed in different governmental jobs specially in the railway sector. But soon after Banglee began to treat them as foreigners and a symbol of West Pakistani oppression. The first conflict arose between the Bangladeshi and Bihari Community when the question of the state language of Pakistan was made. Almost all the Bengali people were trying to establish Bangla as one of the state languages whereas West Pakistan wanted to establish Urdu as the one and only state language of Pakistan. This Bihari Community at that time supported the West Pakistani as they also used Urdu as their mother tongue. In fact, Urdu has also provided them a special status. Thereby, this event created the first crack in the relationship between Bengali and Bihari Community. Later on, the Bihari Community took active part in the war of 1971 in favour of West Pakistan and thereafter killed a good number of civilians living in Bangladesh. They acted as active members of the paramilitary forces such as Albadar, Ashams. They were mainly infamous for conducting rape and killing of innocent people living in Dhaka city on 15th December, 1971. In fact, they continued to fight against the Mukhti force even after the surrender of the Pak Force on 16th December 1971. Moreover, some historians also believe that they were engaged in the operation searchlight where the Pakistani military force killed thousands of Bengali people. Thereby, it is clear that Bihari people has committed a lot of genocide and crime against humanity during the liberation war and for which they also has to face trials and good number of Bihari at that time were killed and displaced from their residences [8]. After the liberation war, a good number of Bihari went back to Pakistan but the people specially the impoverished people were not able to settle in Pakistan. However, the Pakistani Government made an agreement that they would ensure the repatriation of the Bihari people.

3. Repatriation of Bihari People

The repatriation of the Bihari Community was started by the

execution of Shimla Agreement which was conducted in 1972 just after the liberation war. This agreement was done to normalise the relationship between India and Pakistan. It also dealt with the POW captured by the Mukti and Indian Forces. Moreover, it also created the path for the negotiation between Bangladesh and Pakistan for the repatriation of the stranded Pakistani in Bangladesh.

Later on, we see the Delhi trilateral Agreement among Bangladesh, Pakistan and India. This is the first agreement which was made in 1974 with a view to the exchanges the POWs and people failed to return to their native land. Basically, by this agreement, an arrangement was made to let the Bengali people living in Pakistan to return their native land and it also allowed the stranded Pakistani to repatriate in Pakistan. With that view, a good number of stranded Pakistanis went back to their native land with the help of UNHCR and the International Red Cross Community. This process of repatriation continued for more than a decade during 1974 to 1993. This process of repatriation has faced serious hindrance when some political parties went against this decision in Pakistan. Thereby, the PPP had decided to end this chapter of repatriation by stating that all the stranded Pakistanis who fall within the category have been relocated and thereafter the left behinds are not the burden of the Pakistan Government [9].

4. The Present Status of Bihari Community in Bangladesh according to the National Legislature

In Bangladesh, we basically have four statutes that specifically dealt with the question of citizenship. Those statutes are- The Constitution, The Citizenship Act, 1951, The Naturalisation Act, 1922, The Bangladesh Citizenship (Temporary Provisions) Order, 1972 [10]. The Constitution of Bangladesh did not say a lot but clearly specified that the citizenship of Bangladesh shall be determined by the law of the land.

The Constitution of Bangladesh has clearly stated in the Art.6 that Citizenship shall be determined and regulated by Law [11]. And it has also stated that the citizens of Bangladesh shall be known as Bangladeshies.

The Citizenship Act of 1951 is one of such laws that deals with the process of granting citizenship [12]. It basically suggests six ways of getting the citizenship of Bangladesh and those are - Citizenship by way of Birth, descent, migration, naturalisation, marriage, honorary citizenship.

Here, the author would discuss only the ways of getting citizenship which are highly linked with the Bihari Community. Firstly, let us discuss the concept of citizenship by birth where it is mentioned that every person born in Bangladesh shall be a citizen of this country after the commencement of this Act. Thereby, every person born in Bangladesh after 13th April 1951 shall be treated as the citizen of Bangladesh. But this rule would not be applicable if his father is an enemy alien and the birth occurs in a place which is under the control of the enemy alien. Secondly, it is said in the same Act, that

a person shall not be treated as a citizen of Bangladesh by descent if his or her mother/father is not a citizen of Bangladesh.

Now, if we analyse these two sections of the Citizenship Act, then we can clearly state that the Bihari community do not fall within this criteria. People of Bangladesh as well as the Government of Bangladesh always treated them as the alien enemy who had supported the Pakistani Army during the liberation war. In fact they used to describe themselves as the stranded Pakistani and they always wanted to settle in Pakistan. Thereby, their descendants who were born in Bangladesh did not get the citizenship of Bangladesh. Moreover, the Bihari Community has a tendency of inter community marriage there by, their heirs did not have the scope of claiming citizenship by descendant.

Now, let us see whether they can claim citizenship through migration and naturalisation. Firstly, section 6 of the Citizenship Act, stated that any person who has entered into this territory from any place of the Indo-Pak Subcontinent may become the citizen of Bangladesh at the will of the Government. But as stated earlier no elected government of Bangladesh was willing to declare them as Bangladeshi. Moreover, they also did not have any intention to settle here. Secondly, section 9 of the same Act has allowed the process of becoming citizens of Bangladesh by way of Naturalization. It has stated that a person who fulfils all the criteria mentioned in the Naturalization Act, 1926 can apply to the Government for getting the Citizenship [13]. Section 3 of the Naturalization Act, 1926 has stated that a person can apply for the citizenship under the concept of naturalisation if he is not a minor, is of good character, adequate knowledge of Bengali and has the intention of living in Bangladesh subject to the facts that he is not a minor and residing in Bangladesh for not less than 4 years. Thereby, it is possible for the people of Bihari Community to claim the citizenship of Bangladesh by way of naturalisation. However, no application has been made in this behalf and this Act has provided the utmost discretionary power to the government and the court of Bangladesh does not have any power to challenge the issue.

Thereby, it can be stated that there is some scope under the law to claim citizenship but neither the Bihari nor the government is willing to settle this issue. However, the situation has changed and now most of the people of this community want to be the citizens of Bangladesh.

5. The Relevant Case Laws

This issue of Bihari Community has also come before the court and the Supreme Court of Bangladesh gave it directions on different cases regarding this topic.

The Following are the cases where the issue of citizenship of the Bihari Community was discussed -

1. Abid Khan and Others v. Government of Bangladesh [14].
2. Mukter Ahmed v. Government of Bangladesh [15].

3. Abdul Khaleque v The Court of Settlement and Others [16].
4. Bangladesh v. Prof. Golam Azam [17].
5. Sadaqat Khan v. Chief Election Commissioner [18].
6. Abdul Haque v. Bangladesh [19].

However, among those cases, Abid Khan and Sadaqat Khan cases are the most prominent cases that directly dealt with the issue of citizenship and where citizenship was awarded to the people of Bihari Community. In the Abid Khan Case, the honourable Justice Zinat Ara has divided the 10 Bihari Petitioners into two groups. Here, the first group was made with the people who were born before the liberation war and the second group consisted of the people who were born after 1976. In this case the court has to address two main factors and those are whether they can be considered as a citizen of Bangladesh under the national law which would allow them to exercise their right to vote and whether living in the Geneva Camp would be a bar for them to be a citizen of Bangladesh. In this case, the court went through different Bangladeshi laws to clearly identify whether they were barred by the laws or not. Especially by section 2B of the Bangladesh Citizenship (Temporary Provisions) Order, 1972. Where it has been said that a person or his father / grandfather even if born in Bangladesh shall not be considered as the citizen of Bangladesh if he “Owes, affirms or acknowledges, expressly or by conduct, allegiance to a foreign state.” The Court in this point directed that the people of the second group were born after the liberation war and no report shows any evidence to that effect. In addition, the same goes for the first group as there is no evidence to that effect. The court further stated that a person living in the Geneva Camp and using Urdu as their mother tongue would not disentitle them from claiming the citizenship of Bangladesh. In this regard the court referred to the case of Mukter Ahmed v The Government of Bangladesh and Abdul Khaleque Vs. The Court of Settlement and others where it has been stated that a mere applying for the foreign citizenship would not be a bar for claiming the citizenship of Bangladesh. The Court also mentioned the findings of the case of Bangladesh v. Golam Azam where it has been stated that a diehard pro-pakistani born in this country shall be entitled to the citizenship of Bangladesh if he fulfils all the requirements and is not barred by the s.2B or any other laws of the land. The Court also directed that the provision of s.4 of the Citizenship Act was not relevant for this case. Thereby, on the basis of the findings the court has stated that all the petitioners were the citizens of Bangladesh and they were allowed by the law to vote. However, this decision is not applicable for all the Bihari people and therefore, a new writ petition has been filed named Sadaqat Khan v Chief Election Commissioner, 2007.

In the case of Sadaqat Khan, the court has stated that if the 10 petitioners of the Mukter Ahmed case and the Bihari living outside the camp can become the citizen of Bangladesh then what could prevent them (people living in the camp) from being the citizens of Bangladesh? The Court also asked the question, whether the law of the land is applicable in the Geneva Camp or not? If the law of the land is applicable then why should they not be considered

as the citizens of Bangladesh? The court found that the Geneva camp was not relieved from the laws of the land and therefore, the Citizenship Act and the Presidential Order were applicable in the camp. The court in this case divided all the people in the Bihari camp into two groups-

1. Firstly, those people who considered themselves as the stranded pakistani and swore their allegiance to Pakistan and willing to leave Bangladesh sooner or later.
2. Secondly, those people who were minor during the liberation war and those who were born after the liberation war.

The Court then stated that all people falling in the categories of the second group were the citizens of Bangladesh by birth and they did not need any affirmation from the government for that effect. Further stated that the people of the first group are not the citizens of Bangladesh and their future should be decided by their faith and they were not the responsibilities of the Bangladesh government. Therefore, according to this case every person who was minor during the war and those who were born after the war are the citizens of Bangladesh. This case did not directly state anything about the people who attended the age of majority before the liberation war.

Author's Observation

Author observed that most of the writers often tried to use the Sadaqat Khan Case as the justification for their claim that all the people of Bihari Community are the citizens of Bangladesh [20-22]. But it is totally a misconception, as this case only guaranteed the citizenship of the people who were minor or born after the liberation war. It did not say anything about the people who attended the majority at time of liberation war irrespective of whether they show their allegiance to any other country or not.

Now, after thorough analysis the author comes to an conclusion that all the people of the Bihari community are the citizens of Bangladesh except those who showed allegiance to the government of Bangladesh as such goes directly against the law. And all the other laws do not create any hindrance as those people were never ever declared as the enemy alien of the state. However, it is indeed true that some of their members fought against the dream of the Bengali but such an act does not make them an alien enemy. Thereby, it can be said that all the people born after the liberation war or the people who were minor during the liberation war are the citizens of Bangladesh but all the people who attended the age of majority at the time of war are not the citizens of Bangladesh they fall within the category of statelessness. Besides, the government of Bangladesh is not interested in declaring them as the citizens of Bangladesh as it tried to pass a bill named the "The Citizenship Act, 2016" [23]. This bill has stated in s. 4(1)(b) that the children of enemy alien would not be allowed to receive the citizenship of Bangladesh even if they fulfil all the criteria of Citizenship and the definition of enemy alien was given in the s. 2(7) where it was stated that all people who is or was engaged in any war against Bangladesh shall be considered as the enemy

alien. Fortunately, this bill was not passed by the parliament and thereby, the young generation still has the hope of becoming the citizens of Bangladesh.

6. Conclusion

It is to be remembered by all of us that citizenship is determined by the law and not by history. A person cannot be denied as the citizen of Bangladesh only because of the fact that his father or grandfather took part in any action that goes against the interest of Bangladesh. Furthermore, their chance of repatriation has been lessened as the Supreme Court of Pakistan has directed that the rest of the Bihari people living in Bangladesh are not eligible to be the citizens of Pakistan. Therefore, all the people of Bihari Community (Especially those who were above 18 years of age during the liberation war) should be declared as the citizens of Bangladesh as soon as possible to erase their position as stateless. The author thereby would like to end this discussion by upholding the statement raised in the Sadaqat Khan Case that by not inserting them as the citizens of Bangladesh we are eventually depriving ourselves from the benefits that this particular section of people can provide to us.

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